Filed 2/28/19 P. v. Rojas CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO ROJAS, Defendant and Appellant.	G055648 (Super. Ct. No. 01NF1363) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Cheri T. Pham, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Seth Friedman and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Seeking to avoid the adverse immigration consequences of a 2001 drug conviction based on a guilty plea, Jose Alberto Rojas filed a motion under Penal Code section 1473.7 to vacate the conviction due to ineffective assistance of counsel. (All further statutory references are to the Penal Code unless otherwise noted.) Rojas contended his counsel failed to investigate or accurately advise him of the immigration consequences of the guilty plea and made no attempt to negotiate an alternative, immigration-safe plea.

The trial court denied the motion to vacate on the ground Ramirez failed to demonstrate his counsel's performance was deficient or caused him any prejudice. We affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Rojas came to the United States from Mexico in 1992 at the age of 10. He attended elementary school, middle school, and high school here, and became a lawful permanent resident when he was 18. A year later, in 2001, Rojas was arrested and charged with possession for sale of methamphetamine. (Health & Saf. Code, § 11378.)

On the advice of his defense counsel, Rojas accepted a plea agreement that allowed him to plead guilty to the reduced charge of possession of methamphetamine, a controlled substance (Health and Saf. Code, § 11377, subd. (a)). Rojas was placed on three years formal probation with terms and conditions, including completion of a drug treatment program. After Rojas failed to complete the drug treatment program, he served 180 days in jail.

The Department of Homeland Security (DHS) did not detain Rojas upon his release from custody. In 2015, however, DHS placed Rojas in removal proceedings based on his 2001 drug conviction. The DHS notice cited a provision in section 237, subdivision (a)(2)(B)(i) of the Immigration and Nationality Act, stating an immigrant is

subject to removal from the United States if convicted of "any law or regulation of a State . . . relating to a controlled substance," other than simple possession of marijuana.

A. *The Motion to Vacate the Conviction*

On September 13, 2017, Rojas filed a motion pursuant to section 1473.7 to vacate his 2001 conviction and withdraw his guilty plea. Section 1473.7 allows a person no longer in custody to ask the court to vacate a conviction which "is legally invalid due to prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) The court must grant the motion to vacate "if the moving party establishes, by a preponderance of the evidence, the existence of any of the grounds for relief specified in subdivision (a)." (§ 1473.7, subd. (e)(1).)

In his section 1473.7 motion to vacate, Rojas argued his conviction was unlawful because he was denied the effective assistance of counsel in connection with his guilty plea. Specifically, Rojas contended defense counsel violated his "duty to investigate and accurately advise the defendant about the specific immigration consequences of the plea," and "failed to defend against [those] immigration consequences . . . by attempting to plea bargain for an immigration-safe alternative disposition[.]" The motion cited the unexpectedly dire immigration consequences of the plea, including mandatory deportation, inability to apply for relief from deportation, and permanent exclusion from the United States. The motion asserted Rojas never would have accepted the plea offer had he known of these immigration consequences and, instead, "would have insisted on going to trial or would have accepted more jail time if it meant he could plead to a different charge that would avoid his deportation."

In support, Rojas submitted a declaration stating his defense counsel "never informed me of the immigration consequences of my case[,]" "never consulted with an immigration attorney[,]" and "never did any investigation about the immigration

consequences of my plea nor did he even talk to me about them." "My attorney never advised me there was even a possibility that DHS would deport me as a result of my plea in this case."

Rojas further stated he is the "main financial provider" for his six minor children who are American citizens, and his removal based on the conviction "would be devastating to me and my family," causing everyone "exceptional and unusual hardship." "Staying in this country with my family is the most important thing to me. My home is and always has been the United States of America."

Rojas also submitted a declaration from his current postconviction relief counsel, who is also his immigration attorney. The attorney described the severe immigration consequences under the Immigration and Nationality Act of Rojas's drug conviction. The attorney stated that, had he been consulted, he would have recommended against the proposed plea deal "because of the terrible [immigration] consequences[.]" The attorney also stated that, based on his experience, no immigrant defendant would "be willing to take an offer or plea bargain that looked attractive on the surface if he knew it meant he would never be able to live and be with his family again in his adopted country."

B. *Trial Court Order Denying the Motion to Vacate*

The trial court denied the motion to vacate, finding Rojas failed to establish either prong of an ineffective assistance claim: Rojas neither demonstrated his counsel's performance was deficient nor that counsel's purported deficiency affected the outcome.

On the issue of "substandard performance," the trial court ruled Rojas made "no showing of any failure to advise or of any other error" on the part of his attorney. The court specifically rejected Rojas's assertion his attorney failed to advise him of the immigration consequences of the plea, citing contrary evidence in the record: "[D]efendant's plea form plainly shows that he was advised by his attorney. Moreover, defendant himself signed a declaration under penalty of perjury to that effect when he

entered his plea. [Defense counsel] also signed a statement indicating that he advised defendant of all of the consequences of his plea. There is no support for the present assertion that [defense counsel] never discussed the immigration consequences aside from defendant's belated, self-serving statements."[1]

The trial court also rejected Rojas's contention his former attorney provided ineffective assistance by not attempting to negotiate an alternative, "'immigration safe plea[,]'" concluding "[s]uch an attempt in this case would have almost certainly been futile, as the People's case was strong." The court cited a police report documenting the jailhouse discovery, after Rojas's arrest on two bench warrants, that Rojas "had something in his shoe. He pulled a baggie of methamphetamine out of his shoe. The baggie also contained four smaller baggies, each containing roughly equal amounts of methamphetamine. The net weight of the methamphetamine was 1.7 grams." "Given that the officers actually observed defendant possessing methamphetamine split into baggies of equal amounts" — clear indicia of intent to sale — and Rojas was allowed to plead "to straight possession" with no jail time and the possibility of dismissal in exchange for completing a drug program, the court concluded "there is no reason to believe the District Attorney would have agreed to any sort of plea to a different but related offense."

Finally, the trial court ruled Rojas "failed to demonstrate prejudice." The court pointed to the fact "the People's case was strong," yet Rojas "received a very favorable plea bargain[.]" "His maximum exposure" on the charge of possession for sale "was three years, and he received a lower charge and a drug program . . . ." Moreover, the court noted Rojas "submits nothing to establish that in 2001 he was concerned about

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[1] The order noted the plea form contained the following specific acknowledgment of the immigration consequences of pleading guilty to the drug charge: "I understand that if I am not a citizen of the United States the conviction for the offense charged will have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

his immigration status. Having provided no corroboration for his claim that he would not have accepted the proposed disposition had he been advised of the immigration consequences, defendant has failed to satisfy his burden of showing prejudice by the preponderance of the evidence."

II

DISCUSSION

A. *Preliminary Matters*

Rojas contends the trial court erred in denying his section 1473.7 motion to vacate his conviction because he proved by a preponderance of the evidence he received ineffective assistance in connection with his guilty plea. To prevail on his claim of ineffective assistance, Rojas had to prove "that (1) counsel's representation fell below an objective standard of reasonableness, as judged by 'prevailing professional norms' (*Strickland* [*v. Washington* (1984)] 466 U.S. [668,] 688), and (2) 'but for counsel's unprofessional errors, the result of the proceeding would have been different' (*id*. at p. 694; see *Padilla* [*v. Kennedy* (2010)] 559 U.S. [356,] 366 [(*Padilla*)], that is, 'a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial' (*In re Resendiz* [(2001)] 25 Cal.4th [230,] 253 [(*Resendiz*)], [abrogated in part on other grounds in *Padilla*, *supra*, 559 U.S. at p. 370].)" (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116-1117 (*Olvera*).)

The parties debate at length the applicable standard of review in an appeal from the denial of a section 1473.7 motion to vacate a conviction. We agree abuse of discretion is the appropriate standard where the section 1473.7 motion to vacate is made based on statutory error or a deprivation of statutory rights. (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the court].) However, where, as here, the section 1473.7

motion is made based on a claim of ineffective assistance of counsel, our review of the trial court's order denying the motion is de novo. (See *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76, 79 (*Ogunmowo*); accord, *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; *Olvera, supra,* 24 Cal.App.5th at pp. 1116-1117.) Under this standard, we "accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant." (*Ogunmowo, supra,* 23 Cal.App.5th at p. 76.)

B. *Rojas Failed to Prove His Claim of Ineffective Assistance of Counsel*

Rojas argues he proved his claim of constitutionally deficient representation with his own "uncontroverted" declaration establishing his attorney's several failures: Rojas asserted his attorney failed to advise him of the immigration consequences of the guilty plea, failed to investigate those immigration consequences, and failed to pursue an alternative, immigration-safe plea.

Rojas wrongly characterizes his declaration in support of the motion to vacate as "uncontroverted." As the trial court found, Rojas's declaration under penalty of perjury on the change of plea form that he discussed with his attorney the immigration consequences of the plea directly conflicted with Rojas's *recent* declaration stating his attorney never advised him of those immigration consequences. But even if Rojas had proved his assertions that defense counsel failed to advise him of the immigration consequences of the plea and failed to seek an immigration-safe alternative plea, those "failures" would not establish Rojas's claim of ineffective assistance of counsel for two reasons.

The first reason is that neither purported "failure" on the part of defense counsel constituted deficient performance under "prevailing professional norms" in 2001. (*Strickland, supra,* 466 U.S. at p. 688 [counsel's performance judged by "prevailing professional norms"].) Under current law, defense attorneys have an affirmative

obligation to provide competent advice to noncitizen criminal defendants regarding the potential immigration consequences of guilty or no contest pleas. (*Padilla*, *supra*, 559 U.S. at p. 375; see § 1016.3, subd. (a).) The legal duty established in *Padilla* does not apply retroactively to cases which were final when *Padilla* was decided, however. (*Chaidez v. United States* (2013) 568 U.S. 342, 344.) Because Rojas's conviction was final in 2001, under then "prevailing professional norms," his defense counsel's failure to advise Rojas of the immigration consequences of the plea, or to seek an alternative, immigration-safe plea, could not support a claim of ineffective assistance of counsel. (*Strickland*, *supra*, 466 U.S. at p. 688.)

The second flaw in Rojas's claim of constitutionally deficient representation is his failure to satisfy the "prejudice" prong of the *Strickland* test. In other words, Rojas did not prove it was reasonably probable he would have rejected the plea and "insisted, instead, on proceeding to trial" had he been informed of the immigration consequences of the plea. (*Resendiz*, *supra*, 25 Cal.4th at p. 253, [abrogated in part on other grounds in *Padilla*, *supra*, 559 U.S. at p. 370].)

In *Lee v. United States* (2017) __ U.S. __ [137 S.Ct. 1958] (*Lee*), the United States Supreme Court set a high evidentiary standard for setting aside a guilty plea based on ineffective assistance of counsel. The Court stated: "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee*, *supra*, 137 S.Ct. at p. 1967; see also *Resendiz*, *supra*, 25 Cal.4th at p. 253 ["petitioner's assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence'"].)

The facts of *Lee*, *supra*, 137 S.Ct. 1958 illustrate the sort of "contemporaneous evidence" needed to "substantiate" a defendant's contention he would have rejected a plea deal "had he known that it would lead to mandatory deportation."

(*Id.*, at p. 1967.) The Korean-born Lee had been a lawful permanent resident of the United States for 30 years when he was arrested on a felony drug charge. He agreed to plead guilty in exchange for a light sentence only after his counsel erroneously advised him the conviction would *not* lead to deportation. After discovering counsel's mistake, Lee moved to vacate his conviction based on ineffective assistance in connection with his guilty plea.

The Supreme Court held Lee satisfied his burden of proving he would not have pleaded guilty absent counsel's erroneous advice, noting: "At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that 'deportation was the determinative issue in Lee's decision whether to accept the plea.' [Citation.]" (*Lee*, *supra*, 137 S.Ct. at p. 1963.) "Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences." (*Id*. at pp. 1967-1968.)

Moreover, Lee produced evidence of other facts substantiating his assertion that avoiding deportation was his primary concern during the plea process: "At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child." (*Lee, supra,* 137 S.Ct. at p. 1968.) The Supreme Court concluded, "Lee's claim that he would not have accepted a plea had he known it would lead to deportation is backed by substantial and uncontroverted evidence." (*Id*. at p. 1969.)

In his opening brief, Rojas acknowledged that *Lee*, *supra,* 137 S.Ct. 1958 "is applicable to this case," but failed to recognize the wide gulf between the vivid proof of prejudice made in *Lee* and the insufficient showing Rojas made in his own motion to

vacate the conviction. Unlike the defendant in *Lee*, *supra*, 137 S.Ct. at p. 1967, Rojas did not support his motion to vacate with any "contemporaneous evidence" of his mindset to support his contention he would have rejected the plea deal had he known it would result in deportation.

For example, Rojas did not state in his declaration that he told his attorney either of his immigration status or that he was concerned about the immigration consequences of pleading guilty. Unlike the defendant in *Lee*, Rojas did not cite any family obligations or job which existed in 2001 and would have corroborated his contention that he, at age 19, would have chosen to go to trial and risk a potential three-year prison term rather than plead guilty to a charge of simple possession in exchange for a sentence of formal probation and the opportunity to have the charge dismissed upon successful completion of a drug program.

Rojas relies on *Lee* to his benefit, citing its recognition that an immigrant defendant facing the "dire" consequence of deportation following a guilty plea could reasonably choose to reject "any plea leading to deportation in favor of throwing a 'Hail Mary' at trial." (*Lee*, *supra*, 137 S.Ct. at p. 1961.) Rojas also cites *Lee*'s recognition that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." (*Id.* at p. 1968, internal quotation marks omitted.) Rojas argues the trial court erred by ignoring these observations. Instead, the court wrongly focused "on the strength of the case against Rojas" in finding Rojas failed to prove he would have rejected the plea and gone to trial had he known the plea would lead to deportation. Rojas contends "it is absurd to think [Rojas] would have accepted . . . the *dire* result of deportation and given up a chance, no matter how slim, to possibly avoid that dire result by going to trial."

While sympathetic to Rojas's argument, we cannot ignore it lacks a crucial ingredient: any *evidence* that for Rojas, at age 19, remaining in the United States was more important than avoiding a potential 3-year prison term. Unlike the defendant in

Lee, Rojas did not submit "contemporaneous evidence" to "substantiate [his] expressed preferences." (*Lee, supra*, 137 S.Ct. at p. 1967.)

A trial court may consider this factor in evaluating a petitioner's claim of prejudice. (*People v. Martinez* (2013) 57 Cal.4th 555, 565 [court "may" reject defendant's claim that if properly advised defendant would have rejected plea bargain where defendant offers no corroborating evidence].) Here, the trial court relied on the absence of contemporaneous evidence to disbelieve Rojas's claim he would have rejected the negotiated offer and gone to trial. We are bound by that factual determination. The trial court also observed, Rojas received "a very favorable plea bargain" and submitted "nothing to establish that in 2001 he was concerned about his immigration status." Consequently, substantial evidence supports the court's conclusion Ramirez did not carry his burden of proving prejudice under the *Strickland* test. (*Resendiz, supra*, 25 Cal.4th at p. 253.)

Nor did Rojas demonstrate prejudice from his defense counsel's purported failure to seek an alternative, immigration-safe plea. Given the strong evidence Rojas possessed methamphetamine for sale, there is no reasonable probability Rojas could have obtained a plea bargain involving conviction for something other than a drug offense.

Because Rojas failed to satisfy either the deficient performance prong or the prejudice prong of the *Strickland* test, the trial court properly denied his motion to vacate the conviction based on ineffective assistance of counsel.

III

DISPOSITION

The order denying the motion to vacate judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

GOETHALS, J.